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Securities - Outsiders Who Trade on Inside Information Held Accountable to the Corporation for Their Profits on the Basis of Common Law Fiduciary Principles

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perform struck work, or bargain for a contract clause exempting supervisors from union discipline for performance of such struck work.¹⁰²

The language of the Supreme Court in its recent decision in *NLRB v. Boeing Co.*¹⁰³ is relevant to a resolution of the issues involved in the *Electrical Workers* cases:

While "unreasonable" fines may be more coercive than "reasonable" fines, all fines are coercive to a greater or lesser degree. The underlying basis for the holdings of *Allis-Chalmers* and *Scofield* was not that reasonable fines were non-coercive under the language of §8(b)(1)(A), but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act.¹⁰⁴

Section 8(b)(1)(B) similarly does not appear to have been intended by Congress to apply to union discipline which does not restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining and the adjustment of grievances. Such a reading of the congressional intent is consistent with the Act's policy of allowing a union to protect its status during a strike.

Section 8(b)(1)(B) itself cannot be read to prohibit discipline of supervisor-members for performance of rank-and-file work during a lawful economic strike. The Seventh Circuit decision expands section 8(b)(1)(B) beyond its purpose. The rule of the District of Columbia Circuit should prevail.

Richard J. Conn

SECURITIES — OUTSIDERS WHO TRADE ON INSIDE INFORMATION HELD ACCOUNTABLE TO THE CORPORATION FOR THEIR PROFITS ON THE BASIS OF COMMON LAW FIDUCIARY PRINCIPLES.

Schein v. Chasen (2d Cir. 1973)

Invoking the diversity jurisdiction of the court, the plaintiffs brought shareholders' derivative actions on behalf of Lum's, Inc. (Lum's), a Florida corporation engaged in the restaurant franchising business, alleging that the defendants were jointly and severally liable under state corporation law

102. See Gould, *supra* note 74, at 1129.

103. 93 S. Ct. 1952 (1973).

104. *Id.* at 1956.

for profits realized by two mutual funds which had traded in Lum's stock on the basis of confidential corporate information.¹ No violation of federal securities laws was alleged.²

The complaint made the following allegations. In November 1969, Chasen, the president of Lum's, disclosed to the financial community that the corporate earnings for the fiscal year would be approximately \$1.00 per share. On January 5, 1970, Chasen learned that this projection was overly optimistic and that a more realistic estimate would be \$.76 per share. Instead of immediately announcing this fact to the public, Chasen disclosed the information to Simon, a registered representative of Lehman Brothers, who, while aware that the information had not been released to the public, in turn, telephoned the information to Sit, an employee of Investors Diversified Services, Inc. (IDS). Sit immediately relayed the information to Jundt, another employee of IDS. Sit and Jundt managed stock portfolios of the mutual funds, Investors Variable Payment Fund, Inc. (Investors) and IDS New Dimensions Fund, Inc. (Dimensions). The next morning, before any public disclosure of the reduced projected earnings, the two mutual funds, which held 83,000 shares of Lum's, sold all their stock. The sales were executed on the New York Stock Exchange at a price of approximately \$17.50 per share.³ That afternoon, the Exchange halted further trading in Lum's stock pending a company announcement, and later that day Lum's publicly revealed the new earnings forecast. When trading in Lum's was resumed on the next business day, volume was heavy and the stock closed at a price \$3.50 per share lower than that realized by the mutual funds.

The plaintiffs' complaints named Chasen, Simon, Sit, Jundt, Lehman Brothers, IDS, and the two IDS mutual funds (Dimensions and Investors) as defendants. The district court granted motions to dismiss by Sit, Jundt, and Chasen pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure on the ground that personal jurisdiction was not properly obtained under the New York long arm statute.⁴ Holding that Florida state law was the proper substantive law to apply,⁵ the court further dismissed the

1. Three actions were consolidated in the district court: *Gildenhorn v. Lum's, Inc.*, *Gregorio v. Lum's, Inc.*, and *Schein v. Chasen*. The district court's opinion is reported as *Gildenhorn v. Lum's, Inc.*, 335 F. Supp. 329 (S.D.N.Y. 1971).

2. *Id.* at 332.

3. Significantly, neither Lehman Brothers nor Simon traded for their own accounts. *Id.*

4. *Id.* at 331 n.1 & 335. As it was a diversity action, personal jurisdiction over the defendants was determined by New York law pursuant to Rule 4(d)(7) of the Federal Rules of Civil Procedure. *Id.* at 334. The New York Long Arm Statute is N.Y. CIV. PRAC. § 302(a) (McKinney 1963). Requirements for valid out of state service of process are contained in N.Y. CIV. PRAC. § 313 (McKinney 1963).

5. 335 F. Supp. at 332-33. The court considered several choice of law tests and determined that each test dictated the application of Florida law. This determination was not challenged on appeal.

complaints against Simon, Lehman Brothers, IDS, and the two IDS mutual funds for failure to state a cause of action under Florida law.⁶

On appeal, a divided Second Circuit reversed the dismissal of the suits against defendants Lehman Brothers, Simon, IDS, and the two IDS mutual funds,⁷ holding that on the basis of common law fiduciary principles a derivative suit for the benefit of the corporation may be sustained against *outsiders* who trade on inside information⁸ and that the scope of that liability extended even to intermediary tippees (*i.e.* Simon and Lehman Brothers) who did not trade on the inside information but merely passed it on to others who did.⁹ *Schein v. Chasen*, 478 F.2d 817 (2d Cir.), *cert. granted sub nom.* Lehman Bros. v. Schein, 94 S. Ct. 568 (1973).

In a forceful dissent, Judge Kaufman characterized the court's reasoning as "a distortion of the law of agency and the law of fiduciary responsibility."¹⁰ While agreeing with the majority's objective of providing a disincentive to insider trading, he vigorously challenged the means employed, believing that the federal securities laws provided a more appropriate vehicle for an attack upon the defendant's conduct.¹¹

As Judge Kaufman stated, "[I]t is no longer debatable that trading on inside information merits universal condemnation."¹² Recent years have seen innovative applications of the federal securities laws — most notably sections 10(b) and 16(b) of the Securities Exchange Act of 1934 and rule 10b-5 as promulgated by the Securities and Exchange Commission — make trading on confidential corporate information an extremely hazardous activity.¹³ However, as noted previously, the plaintiff share-

6. *Id.* at 334. In refusing to extend the rationale of *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 401 N.Y.S.2d 78 (1969), to cover the instant case, Judge Tyler stated:

[T]he New York Court of Appeals [in *Diamond*] held that a corporate fiduciary is liable for profits which he realizes from a sale of stock motivated by inside information received by him in his corporate position. None of the defendants in these actions fit into this mold.

335 F. Supp. at 333.

7. *Schein v. Chasen*, 478 F.2d 817, 825 (2d Cir.), *cert. granted sub nom.* Lehman Bros. v. Schein, 94 S. Ct. 568 (1973). Plaintiff-appellants did not appeal the district court order dismissing the actions against Chasen, Sit, and Jundt. Although Simon filed a similar motion to dismiss for lack of personal jurisdiction, the district court did not rule on it. Because the trial court had not reached this question, the Court of Appeals declined to address it on appeal. *Id.* at 819 n.1.

8. *Id.* at 822. Judge Waterman, writing for the majority, stated:

[I]t is immaterial . . . whether the director trades on his own account in the corporation's stock or whether he passes on the information to outsiders who then trade in the corporation's stock.

Id.

9. *Id.* at 824. The court stated:

[W]e fail to see how equity would be furthered by imposing liability only on the Funds and not on the other participants who supplied the Funds with the inside information.

Id.

10. *Id.* at 825 (Kaufman, J., dissenting).

11. *Id.* at 827 (Kaufman, J., dissenting).

12. *Id.* at 825 (Kaufman, J., dissenting). *But see* H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966).

13. *See, e.g., SEC v. Texas Gulf Sulphur*, 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005, *reh. denied*, 404 U.S. 1064 (1971). Charles Widger School of Law Digital Repository, 1974

holders in *Schein* did not base their claim on any federally created right. Instead, their action took the form of a common law derivative suit on behalf of the corporation.¹⁴ Only because of the accident of diversity was the suit brought in federal court.

It has long been recognized at common law that a corporation is owed fiduciary obligations by its directors, officers, and controlling shareholders.¹⁵ These duties have been described as both "loyalty and allegiance to the corporation — a loyalty that is undivided and an allegiance that is influenced in action by no consideration other than the welfare of the corporation."¹⁶ This duty of undivided loyalty prohibits corporate fiduciaries from competing with the corporation in any way, including the usurpation of corporate opportunities for personal use¹⁷ and participation in transactions when the corporate interest conflicts with and is subordinated to an interest of the fiduciary.¹⁸

The courts, however, have been reluctant to apply these common law fiduciary principles to the area of insider trading in corporate securities.¹⁹ Originally, most courts took the position that, absent fraud or misrepresentation, a corporate fiduciary could deal freely in shares of his corpora-

14. The shareholder's derivative action developed from equity. Courts realized that existing legal remedies to protect minority shareholders were inadequate when the corporation was wronged and those who controlled the corporation refused to sue on its behalf. The derivative suit gives the shareholder the power to "derivatively" enforce a corporation right, indirectly protecting his own interest in the corporation as well as the interests of the creditors and other shareholders. Since the suit is not brought for the benefit of the shareholder but rather on behalf of the corporation, any recovery goes into the corporate treasury. See H. HENN, *LAW OF CORPORATIONS* § 358 (2d ed. 1970).

The American genesis of the shareholder's derivative suit is usually considered to be the early New York case, *Robinson v. Smith*, 3 Paige Ch. *222, 24 Am. Dec. 212 (N.Y. 1832), but dicta in support of the theory of management's accountability to the suits of minority stockholders is found as far back as 1817 in Chancellor Kent's opinion in *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. *371, *389-90 (N.Y. 1817). In 1855, the United States Supreme Court placed its imprimatur on the shareholder's right to redress in a derivative suit in *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855). See Hornstein, *The Shareholder's Derivative Suit in the United States*, 1967 J. BUS. L. 282; Prunty, *The Shareholders Derivative Suit: Notes on its Derivation*, 32 N.Y.U.L. REV. 980 (1957).

15. See W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 838 (perm. ed. 1965).

16. *Litwin v. Allen*, 25 N.Y.S.2d 667, 667-68 (Sup. Ct. 1940), quoted in HENN, *supra* note 14, at § 235.

17. See, e.g., *Ragnar Benson, Inc. v. Kassab*, 325 F.2d 591 (3d Cir. 1963); *Zampetti v. Cavanaugh*, 406 Pa. 259, 176 A.2d 906 (1962). See generally HENN, *supra* note 14, at § 237; 6 Z. CAVITCH, *BUSINESS ORGANIZATIONS* § 127.06 (1972); Slaughter, *Corporate Opportunity Doctrine*, 18 Sw. L.J. 96 (1964); Wadmond, *Seizure of Corporate Opportunity*, 17 BUS. LAW. 63 (1961).

18. See CAVITCH, *supra* note 17, at § 127.06. See generally Prochnow, *Conflict of Interest and the Corporate Trustee*, 22 BUS. LAW. 929 (1967); Davis, *Conflicts of Interest between Corporations and Their Directors, Officers, Employees and Agents*, 8 ROCKY MT. M.L. INST. 191 (1963).

19. The inadequacy of the common law in the area of securities trading has long been recognized and led to the passage of the federal securities laws. Hearings held prior to the promulgation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-jj (1971), disclosed that one of the principal causes of the collapse of investor confidence in the securities market was trading by insiders on confidential corporate information. *Hearings on Stock Exchange Practices Before the Senate Comm. on Banking and Finance*, 74 CONG. RECD. 11,334 (1934).

tion.²⁰ Gradually, however, courts began to recognize that "special facts" could justify the imposition on directors or officers of a fiduciary duty to disclose inside information to the individual shareholders with whom they traded.²¹ Eventually, a "minority rule" evolved under which corporate insiders were held to a fiduciary duty to prospective buyers and sellers regardless of the "special facts" involved.²² However, even with the so-called "minority rule", insider trading by corporate fiduciaries was not normally viewed as a violation of fiduciary duty *with respect to the corporation* — only as to the purchasing or selling shareholder.²³ Although a number of cases purported to acknowledge the existence of a fiduciary duty running to the corporation, close analysis of the decisions reveals that evidence of either corporate opportunity usurpation, conflict of interest, use of corporate funds, competition with the corporation or other corporate injury was present.²⁴

The first real indication of judicial willingness to establish a definitive common law fiduciary relationship between the inside trader and the corporation was found in *Brophy v. Cities Service Co.*²⁵ In *Brophy*, a shareholder's derivative action under Delaware law was brought against an employee of a corporation who, by reason of his employment, had learned of the corporation's intention to purchase its own stock in quantities sufficient to cause a rise in the market price. He bought shares before the corporation's purchase and thereafter sold them at a profit.

20. See, e.g., *Chatz v. Midco Oil Corp.*, 152 F.2d 153, 155 (7th Cir. 1945). The rationale was that the corporate fiduciary's shares were personal property and his dealings in personal securities could not be viewed as corporate transactions. Therefore, no violation of any fiduciary duty owed the corporation was involved. See generally CAVITCH, *supra* note 17, at § 127.07[1]. The absence of a recognized fiduciary relationship between the inside trader and the purchasing or selling shareholder was an application of the traditional common law doctrine of *caveat emptor*. See 1970 Wis. L. Rev. 576, 577.

21. See *Strong v. Repide*, 213 U.S. 419 (1909), where the principles of this doctrine were first articulated. See also N. LATTIN, *THE LAW OF CORPORATIONS* § 81 (2d ed. 1971).

22. See, e.g., *Jacobsen v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1962); *Hotchkiss v. Fischer*, 136 Kan. 530, 16 P.2d 531 (1932). But even under the "minority rule," liability attaches only when it can be shown that the shareholder relied on the non-disclosure. See HENN, *supra* note 14, at § 239. In *Goodwin v. Agassiz*, 283 Mass. 358, 106 N.E. 659 (1933), such reliance was deemed lacking when the transaction took place on a securities exchange.

23. See *Stephen v. Hale-Hass Corp.*, 249 Wis. 205, 23 N.W.2d 620 (1946).

24. See, e.g., *Pratt v. Shell Petroleum Corp.*, 100 F.2d 833 (10th Cir. 1938), *cert. denied*, 306 U.S. 659 (1939) (conflict of interest); *Loft, Inc. v. Guth*, 23 Del. Ch. 138, 2 A.2d 225 (Ch. 1938), *aff'd* 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939) (appropriation of business opportunity); *Bromschwig v. Carthage Marble & White Lime Co.*, 334 Mo. 319, 66 S.W.2d 889 (1933) (use of corporate funds); *Byrne v. Barrett*, 268 N.Y. 199, 197 N.E. 217 (1935) (appropriation of a business opportunity). In these cases the courts' focus was on determining whether the manner in which the confidential corporate information was used breached a fiduciary duty rather than whether the use of inside information per se constituted a breach. But cf. *Louisiana Mortgage Corp. v. Pickens*, 167 So. 914 (La. App. 1936) (president of corporation could be required to account to corporation for profits derived from disclosing information concerning corporate assets to a judgment creditor of the corporation notwithstanding that the disclosure caused no damage to the corporation).

25. 31 Del. Ch. 241, 70 A.2d 145 (Ch. 1949), *note on* 63 MAR. L. REV. 1446 (1949).

In denying the defendant's motion to dismiss for failure to state a cause of action, the court held that the employee, by virtue of his having obtained such confidential corporate information, occupied a position of trust with respect to the corporation analogous to that of a fiduciary.²⁶ The court further held that as a constructive trustee the employee could be compelled to account to the corporation for all profits realized from trading in the stock, even though the corporation incurred no injury.²⁷ According to *Brophy*, it was no longer necessary to find evidence of traditional common law doctrines such as usurpation of corporate opportunity²⁸ and conflict of interest²⁹ before the existence of a fiduciary relationship between the inside trader and the corporation could be established.³⁰ The decision in *Brophy* was the first suggestion that the mere possession of confidential information (at least by a corporate employee) could create a fiduciary duty to the corporation not to use the information for personal advantage.

It was *Brophy* that provided the New York Court of Appeals with the common law precedent upon which to base its decision in *Diamond v. Oreamuno*.³¹ *Diamond* was a stockholder's derivative action brought against the president and chairman of the board of Management Assistance, Inc. (MAI)³² to compel an accounting for profits allegedly obtained by the defendants through a violation of their fiduciary duty to the corporation. The complaint charged that the defendants sold shares of MAI stock on the basis of confidential information that corporate earnings would decline sharply.³³ Later, after the information was publicly disclosed, the value of the MAI stock dropped to a price \$17.00 per share lower than the

26. 31 Del. Ch. at 244, 70 A.2d at 7. The employee was a "confidential secretary" whose duties had no relation to the corporation's decision to purchase the stock. The court noted that such an employee would not ordinarily have fiduciary responsibilities to the corporation. *Id.* at 244-45, 70 A.2d at 7.

27. *Id.* at 244-46, 70 A.2d at 7-8. As the employee involved was a non-officer of the company, section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1970), was inapplicable, yet *Brophy* has been described as "imposing a common law liability paralleling section 16(b)." Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 409 (1953).

28. See note 17 and accompanying text *supra*.

29. See note 18 and accompanying text *supra*.

30. *But cf.* 83 HARV. L. REV. 1421, 1428 n.25 (1970), where it is argued that the employee in *Brophy* was in economic competition with the corporation and that the case could represent an application of the corporate opportunity doctrine.

31. 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969), *aff'g* 29 App. Div. 2d 285, 287 N.Y.S.2d 300 (1st Dep't 1968). For commentary, see 18 BUFFALO L. REV. 193 (1969); 83 HARV. L. REV. 1421 (1970); 45 NOTRE DAME LAW. 314 (1970); 31 U. PITT. L. REV. 296 (1969); 22 VAND. L. REV. 1412 (1969); 55 VA. L. REV. 1520 (1969); 1970 WIS. L. REV. 576.

32. Management Assistance, Inc., financed the installation of computers through sale and lease-back arrangements with various industrial and commercial firms. 24 N.Y.2d at 496, 248 N.E.2d at 911, 301 N.Y.S.2d at 79-80.

33. Lease provisions required that MAI repair and maintain the computers. Due to a lack of capacity, MAI was forced to turn to the manufacturer of the computers, International Business Machines (IBM), to service the machines. A drastic increase in the price charged by IBM for this work caused MAI's expenses to soar and its net earnings to drop about 75 per cent. *Id.* at 496-97, 248 N.E.2d at 911,

price received by the defendants. The defendants were thus able to realize a "profit"³⁴ of \$800,000 on the sale of the securities.³⁵

In denying the defendants' motion to dismiss, a unanimous court held that the officers and directors who traded on material inside information were liable to the corporation in a shareholder's derivative action for the gains realized from their transactions, even though the corporation suffered no damage.³⁶

The *Diamond* court based its holding on a number of grounds. First, under general principles of agency and trust law an agent or trustee is not permitted to exploit his position for profit. Confidential information was found to be a corporate asset which could not be appropriated by corporate fiduciaries for their own use.³⁷ Relying on the New York case of *Byrne v. Barrett*,³⁸ comment *c* to section 388 of the Restatement (Second) of Agency,³⁹ and *Brophy*,⁴⁰ the court determined that the dealings of the defendants breached their fiduciary duty and that a derivative suit was the proper vehicle for recovery. Second, the court saw no difficulty with

34. The term "profit" in this context refers to the differential between what the defendants actually received for the stock and what they would have received if they had sold the stock after the information was disclosed to the public. The term is, therefore, synonymous with "avoidance of loss."

35. *Id.* at 497, 248 N.E.2d at 911, 301 N.Y.S.2d at 80.

36. Chief Judge Fuld stated the question presented as:

[W]hether officers and directors may be held accountable to their corporation for gains realized by them from transactions in the company's stock as a result of their use of material inside information.

Id. at 496, 248 N.E.2d at 911, 301 N.Y.S.2d at 79.

37. *Id.* at 498, 248 N.E.2d at 912, 301 N.Y.S.2d at 81.

38. 268 N.Y. 199, 197 N.E. 217 (1935). In *Byrne*, a real estate salesman who had acquired confidential information in the course of his employment resigned and used the knowledge to consummate the transaction in his own behalf. He was held liable to his former employer for the commissions earned. The case, therefore, illustrates the traditional common law doctrine forbidding an agent from using confidential information to compete with his principal. See note 24 and accompanying text *supra*.

39. RESTATEMENT (SECOND) OF AGENCY § 388, comment *c*, which provides in pertinent part:

c. Use of confidential information. An agent who acquires confidential information in the course of his employment . . . has a duty . . . to account for any profits made by the use of such information, although this does not harm the principal So, if he has inside information that the corporation is about to purchase or sell securities, or about to declare or pass a dividend, profits made by him in stock transactions undertaken because of his knowledge are held in trust for the principal.

However, as more than one commentator has observed, all the annotations to this section contain elements of a usurpation of corporate opportunity, conflict of interest, or some other form of injury to the principal. See 37 FORDHAM L. REV. 477, 480 (1969); 45 NOTRE DAME LAW. 314, 321 (1970).

40. *Brophy v. Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (Ch. 1949). See text accompanying notes 25-30 *supra*. The *Diamond* court quoted from the *Brophy* decision:

Public policy will not permit an employee occupying a position of trust and confidence toward his employer to abuse that relationship to his own profit, regardless of whether his employer suffers a loss.

24 N.Y.2d at 501, 248 N.E.2d at 914, 301 N.Y.S.2d at 83, quoting 31 Del. Ch. at 246, 70 A.2d at 8.

the absence in the complaint of any allegation of corporate harm.⁴¹ The derivative action was not to be viewed as a compensatory remedy, but rather as a preventative measure to remove all inducements to trading by corporate insiders. Although damage to the corporation was not an essential requirement, the court found that corporate injury might well be inferred from the effect that such conduct could have on the good will of the company and the marketability of its securities.⁴² Third, the court recognized that its decision was within the spirit of the federal securities laws. Finding that the conduct of the defendants constituted an abuse of a fiduciary relationship similar to that condemned by section 16(b) of the Securities Exchange Act of 1934 and that the federal remedies were extremely limited in this factual situation,⁴³ the court declared that it was imperative that an effective common law remedy be created which would permit corporate recovery. Finally, while acknowledging the threat of double liability (*i.e.*, liability both to the corporation and to those with whom the defendants traded), the court stated that the remedies prescribed by the federal securities laws were not exclusive⁴⁴ and that the mere possibility of other suits should not preclude recovery by the corporation.⁴⁵

In *Schein v. Chasen*,⁴⁶ the Second Circuit was compelled to apply Florida law.⁴⁷ However, Judge Waterman, writing for the majority, found no Florida precedents upon which the court could rely.⁴⁸ He therefore deemed it proper for the court to look to the law of other jurisdictions and particularly to New York where the New York Court of Appeals'

41. According to the court:

The primary concern . . . is not to determine whether the corporation has been damaged but to decide, as between the corporation and the defendants, who has a higher claim to the proceeds derived from the exploitation of the information.

24 N.Y.2d at 498, 248 N.E.2d at 9-10, 310 N.Y.S.2d at 81.

42. The court quoted from Presiding Justice Botein's opinion for the Appellate Division:

The prestige and good will of a corporation, so vital to its prosperity, may be undermined by the revelation that its chief officers had been making personal profits out of corporate events which they had not disclosed to the community of stockholders.

Id. at 499, 248 N.E.2d at 912-13, 310 N.Y.S.2d at 82, quoting *Diamond v. Oreamuno*, 29 App. Div. 2d 285, 287, 287 N.Y.S.2d 300, 303 (1st Dep't 1968).

43. Since neither the plaintiff-shareholder nor MAI was a party to the transactions in question, they had no recourse under rule 10b-5, 17 C.F.R. § 240.10b-5 (1973), because they could not satisfy the "purchaser-seller" requirement established in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). See notes 86 & 87 *infra*. Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1970), was also inapplicable since the defendants had held their shares longer than six months.

44. 24 N.Y.2d at 504, 248 N.E.2d at 915, 301 N.Y.S.2d at 85. The court referred to section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which provides in pertinent part:

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity . . .

45. The court suggested interpleader as a possible method of avoiding double liability. 24 N.Y.2d at 504, 248 N.E.2d at 915, 301 N.Y.S.2d at 86.

46. 478 F.2d 817 (2d Cir.), *cert. granted sub nom. Lehman Bros. v. Schein*, 94 S. Ct. 568 (1973).

47. See note 5 *supra*.

48. 478 F.2d at 821.

decision in *Diamond* had wrestled with similar issues.⁴⁹ Thus the question framed by the court was:

[W]hether the *Diamond* holding should extend to reach third parties who, though not officers or directors of the injured corporation, are involved with directors in a common enterprise to misuse confidential corporate information for their own enrichment.⁵⁰

By answering in the affirmative, the court extended the *Diamond* holding⁵¹ — that corporate insiders who trade on confidential information must account to the corporation for their profits — to encompass *outsiders* whose only affiliation with the company was that they either traded on inside information or forwarded such information to others who did trade.

The defendants had argued that the *Diamond* decision was predicated on the traditional fiduciary relationship between a corporation and its officers and directors, and equity's longstanding disdain for fiduciaries who use their position for personal profit.⁵² They contended that, as outsiders who owed no fiduciary duty to the corporation, they were beyond the parameters of the *Diamond* holding.⁵³ Defendants Simon and Lehman Brothers further maintained that to hold them liable would be grossly inequitable since they neither traded in Lum's stock nor did they profit from the transactions of the mutual funds.⁵⁴ In rejecting these arguments the court utilized a number of theories from several different areas of law.

It is a well established principle in antitrust law that a formal agreement is not necessary to constitute an unlawful conspiracy.⁵⁵ Agreement may be inferred from circumstantial evidence of business dealings and

49. The court stated:

[O]ur objective is to interpret *Diamond* as the Florida court would probably interpret it and to apply *Diamond*, as so interpreted, to the facts presented here. *Id.* Judge Kaufman, in his dissenting opinion, thought the majority should have taken advantage of Florida's certified question statute, FLA. STAT. ANN. § 25.031 (1961), which allows federal appellate courts to certify to the Florida Supreme Court questions of Florida law on which there are no definitive Florida precedents. *Id.* at 478 F.2d at 828-29 (Kaufman, J., dissenting).

Whether or not the court should have utilized the Florida statute formed the basis for petitions for certiorari filed by Lehman Brothers, Simon, and IDS. The Supreme Court has consolidated the cases and granted certiorari, limiting the argument to the following question:

Did the Court of Appeals for the Second Circuit err in not certifying the question of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure? Fla. Stat. Ann. Sec. 25.032 (1961), Fla. App. Rules, R.4.61 (1967).

Lehman Bros. v. Schein, *cert. granted*, 94 S. Ct. 568 (1973).

50. 478 F.2d at 822.

51. See text accompanying note 36 *supra*.

52. See Brief of Appellees Simon and Lehman Bros. at 8; Brief of Appellees, Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc., at 8; Schein v. Chasen, 478 F.2d 817 (2d Cir.), *cert. granted sub nom.* Lehman Bros. v. Schein, 94 S. Ct. 568 (1973).

53. 478 F.2d at 822.

54. *Id.*

other conduct of alleged conspirators.⁵⁶ Applying this rationale to the instant case, the court stated:

Although there is no allegation in the complaints that a prior explicit agreement existed between Chasen and the defendants, it is obvious that the sequence of events detailed in the pleadings, if proved, will substantiate the existence of a *common enterprise* pursuant to which Chasen was to pass material information to Simon, Simon was to pass it to the Mutual Funds, and the Funds were to capitalize on it by selling Lum's stock prior to the time the material information was announced to and was available to the public.⁵⁷

Having established that the facts alleged were sufficient to discern a "common enterprise" to misuse confidential corporate information, the court then examined whether the liability imposed in *Diamond* should extend to the defendants. The court began its analysis by noting that it could find nothing in the *Diamond* decision which suggested that "co-venturers" of a director who has breached his corporate duty by misusing inside information should escape liability.⁵⁸ The *Diamond* court had determined that damage to the goodwill and prestige of the corporation could be inferred when a director abused his position for personal profit.⁵⁹ In *Schein*, the court found this same corporate interest to be in jeopardy.⁶⁰ As long as a director divulged confidential corporate information, it made no difference who did the actual trading, since public revelation of such conduct could seriously injure the corporation's reputation.⁶¹ The court concluded that it would, therefore, defeat the purpose of *Diamond* to limit its scope to corporate insiders while outside co-venturers were allowed to escape liability.⁶²

The majority noted *Diamond's* "prophylactic effect of providing a disincentive to insider trading"⁶³ and felt that to absolve third parties from

56. See, e.g., *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969), citing *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954).

57. 478 F.2d at 822 (emphasis added). However, Judge Kaufman, dissenting, disagreed:

[T]he facts simply do not comport with the concept of a joint enterprise, a term which implies the existence of a prior plan to carry out a mutually beneficial project. The complaints . . . disclose nothing more than a seemingly unsolicited and haphazard revelation of certain information which was useful in making investment decisions.

Id. at 827 (Kaufman, J., dissenting). For a more elaborate statement of the facts surrounding the case, see *SEC v. Lum's, Inc.*, 365 F. Supp. 1046, 1050-57 (S.D.N.Y. 1973).

58. 478 F.2d at 822.

59. See text accompanying note 42 *supra*.

60. 478 F.2d at 822.

61. *Id.* at 822-23.

62. *Id.* at 823. However, it is submitted that the "corporate damage" argument only becomes even mildly persuasive when the court attempts to balance the equities of the litigants. Otherwise, the damage suffered is speculative and has no real relation to the trading profits sought to be recovered by the corporation.

It was not necessary for the *Schein* court to determine whether a cause of action could be stated in the absence of any allegation of damage to the corporation.

One of the complaints contained a general ad damnum allegation. *Id.* at 824 & n.9

63. *Id.* at 823.

liability to the corporation would encourage the misuse of inside information.⁶⁴ The court stated:

It is clear that this cleansing effect of *Diamond* ought to reach third parties who, through a breach of a fiduciary relationship, become traders advantageously possessed of confidential insider knowledge.⁶⁵

The majority was concerned that third parties such as the defendants might escape liability entirely if the corporation's right to recover under traditional fiduciary principles were not recognized.⁶⁶ Thus, by sustaining the shareholder's derivative action, the *Schein* court provided a common law remedy where remedies under federal securities laws might have proved inadequate or unavailable.⁶⁷ Although Judge Kaufman's dissent vigorously attacked this "plugging the gap" rationale,⁶⁸ it was justified by the majority

64. *Id.* To immunize such third parties might encourage corporate officials to leak confidential information either to friends or to outsiders who might some day return the favor. Such "implied understandings" would make it possible for a corporate official to profit from the disclosure of confidential corporate information without ever having traded in his company's stock. The danger of this kind of reciprocal trading scheme was noted by the court in *SEC v. Texas Gulf Sulphur*, 446 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 404 U.S. 1005, *reh. denied*, 404 U.S. 1064 (1971), wherein a corporate insider was required to make restitution under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1970), and rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (1973), for the profits derived by his tippees. The *Schein* decision makes this type of conduct even less attractive by allowing the corporation to recover such profits directly from the outside tippees through the common law derivative suit.

65. 478 F.2d at 823.

66. *Id.*

67. This same reasoning was used by the New York Court of Appeals in *Diamond*, 24 N.Y.2d at 502-03, *see* note 43 and accompanying text *supra*. However, at the time of the court's decision in *Schein*, two separate actions had been filed in federal court charging the defendants with violations of rule 10b-5: (1) a class action by the individual traders, *Sanders v. Lum's, Inc.*, No. 70 Civ. 5331 (S.D.N.Y., filed _____); and (2) an administrative suit brought by the Securities and Exchange Commission, *SEC v. Lum's*, 365 F. Supp. 1046 (S.D.N.Y. 1973). In *SEC v. Lum's*, decided subsequent to *Schein*, Lum's, Chasen, Lehman Brothers, Simon, Sit, Jundt, and IDS entered into stipulations of settlement with the SEC. Of the remaining defendants, the district court found that Chasen violated section 10(b) and rule 10b-5 and that his liability could be imputed to Lum's. The court further held that Lehman Brothers was not liable for the improper conduct of Simon since proper supervisory procedures had been taken to prevent such an occurrence. It should be noted, however, that administrative actions by the SEC are only brought in exceptional cases and, as the *Diamond* court noted, "the purpose of such an action . . . would appear to be more to establish a principle than to provide a regular method of enforcement." 24 N.Y.2d 494, 502. The class action suit, *Sanders v. Lum's, Inc.*, is still pending. However, it should be noted that class action suits in general will be much more difficult to prosecute if the Second Circuit's recent decision in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.), *cert. granted*, 414 U.S. 908 (1973), is affirmed by the United States Supreme Court. *See* note 88 *infra*. *See* note 83 *infra* for a discussion of the various types of suits which can be brought in inside information cases and the *Schein* court's suggestion for dealing with the attendant problem of multiple liability.

68. 478 F.2d at 827-28 (Kaufman, J., dissenting). Judge Kaufman distinguished the policy interests underlying federal securities law from those underlying state corporation law:

Although developments in federal securities law indicate an expanding scope of liability for tippee traders . . . the impetus for developing this expanded federal law liability . . . is the need to maintain free and honest securities markets. This need is given great weight when we consider claims under the federal securities law but it is inappropriate in determining whether, *under state common law*, tippee trading is a breach of a fiduciary duty owed to the corporation whose

"[i]n view of the strong desirability of tightening the law of insider trading."⁶⁹

In extending the scope of tippee liability to include all participants in the "common enterprise," the court relied upon section 312 of the *Restatement (Second) of Agency*⁷⁰ and especially comment *c* thereunder which provides:

A person who, with notice that an agent is thereby violating his duty to his principal, receives confidential information from the agent, may be enjoined from disclosing it and required to hold profits received by its use as a constructive trustee. . . .⁷¹

Thus, reasoned the court, it was not necessary to show any pre-existing technical fiduciary relationship with the company in order for liability to attach. Once the material inside information was received the defendant-tippees became corporate fiduciaries with a duty to act as constructive trustees with respect to the confidential matter.⁷² The information was corporate property not to be used for personal advantage and the corporation, therefore, had a right to recover all profits resulting from its use. Furthermore, the court saw no merit in the contentions of Simon and Lehman Brothers that as non-traders it would be inequitable to hold them liable.⁷³ They had provided the essential connection in the scheme to misuse the confidential information and the court found no way that equity would be served if they were exempted from the general rule that "the liabilities of persons engaged in a joint enterprise to commit a wrong are both joint and several liabilities and each participant is liable to account for the profits of the other participants."⁷⁴

shares are traded, and if so, whether such a breach is remediable through use of a shareholders' derivative suit.

Id. (Kaufman, J., dissenting) (emphasis in the original).

69. *Id.* at 823.

70. The RESTATEMENT (SECOND) OF AGENCY § 312 (1958), provides:

A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal.

71. 478 F.2d at 824, quoting RESTATEMENT (SECOND) OF AGENCY § 312, comment *c*, at 51 (1958).

72. 478 F.2d at 823. To further support their finding, the court cited the decisions in *Ohio Oil Co. v. Sharp*, 135 F.2d 303 (10th Cir. 1943) and *Brophy v. Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (Ch. 1949). In *Ohio Oil*, an oil company retained the services of a company to conduct a geophysical survey. The geophysical company agreed not to divulge any information thus obtained without the written consent of the oil company. However, an employee of the geophysical company communicated the results of the survey to the defendant who, with knowledge of the confidentiality of the information, purchased oil leases on the property for himself. The court held that the defendant was a constructive trustee of the oil rights for the oil company. While *Ohio Oil* thus demonstrates the imposition of a constructive trusteeship on a corporate outsider, it is submitted that the case is best viewed as a logical extension of the "corporate opportunity" doctrine, see note 17 and accompanying text *supra*. Although the *Schein* court's reliance on *Brophy* seems to be better founded, it should be remembered that the defendant in *Brophy*, while not a technical fiduciary, was an employee of the corporation.

73. 478 F.2d at 824. The court noted that the liability imposed on Simon and Lehman Brothers was analogous to that imposed under federal securities laws. *Id.* n.8, citing *SEC v. Texas Gulf Sulphur*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005, reh. denied, 404 U.S. 1064 (1971).

The most difficult obstacle for the *Schein* court to overcome in finding liability was the apparent absence of any nexus between Lum's and the defendants. On this point the case could be easily distinguished from the *Diamond* and *Brophy* decisions.⁷⁶ The court's inventive solution was to characterize the pleadings before it as alleging that the defendants were involved in a "common enterprise" with Chasen, the president of Lum's, to misuse information for their own benefit. It was the existence of this "common enterprise" which provided the keystone upon which the court extended the fiduciary principles of *Diamond* to cover the conduct of the defendants. It is unfortunate that because of the procedural context of the case⁷⁶ and the court's own apparent reluctance, the opinion is barren of any real explanation of the elements of this novel theory. The court seemingly relied on the tort concept of "common" or "joint enterprise" in which liability for one person's actions may be imputed to others associated with an undertaking which has been entered into for the mutual benefit of the parties.⁷⁷ Although this rule is founded on the law of partnership, its application has been almost totally restricted to automobile accident cases.⁷⁸ Thus, the court has taken a tort doctrine from automobile law, justified its applicability to the facts in the case on the basis of antitrust principles,⁷⁹ and utilized it to dramatically extend the law of fiduciary responsibility regarding transactions in a corporation's securities. It is submitted that the result in *Schein* would be suspect if based solely on this artful exercise in legal eclecticism. However, the court does suggest an alternative rationale for holding the defendants liable.

Although the court employs comment *c* to section 312 of the *Restatement (Second) of Agency* as support for the imposition on the defendants of a constructive trust regarding the confidential information,⁸⁰ liability under section 312 is actually predicated on a third party's active solicitation of or assistance in an agent's breach of duty owed his principal.⁸¹ By a

75. In *Diamond*, liability was imposed upon directors of the corporation. See notes 31-45 and accompanying text *supra*. The *Brophy* defendant, while not a technical corporate fiduciary, was at least an employee. See notes 25-30 and accompanying text *supra*.

76. The case was before the Second Circuit as an appeal from the grant of a motion to dismiss for failure to state a claim upon which relief could be granted. See notes 4-7 and accompanying text *supra*.

77. See W. PROSSER, *THE LAW OF TORTS* § 72 (4th ed. 1971). Although the doctrine is surrounded by a good deal of confusion, the essential elements of a joint enterprise are:

(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

RESTATEMENT (SECOND) OF TORTS § 491, comment *c*, at 548 (1965). See *Connor v. Southland Corp.*, 240 So. 2d 822 (Fla. App. 1970); *Mukasey v. Aaron*, 20 Utah 2d 383, 438 P.2d 702 (1968).

78. See W. PROSSER, *THE LAW OF TORTS* § 72 (4th ed. 1971).

79. See notes 55 & 56 and accompanying text *supra*.

80. See notes 70-72 and accompanying text *supra*.

81. See cases collected in appendix to RESTATEMENT (SECOND) OF AGENCY § 312 (1958).

strict application of this principle to the instant case the defendant-tippees could be held liable as aiders and abettors. By trading on inside information or conveying it to others, they would become participants in Chasen's breach of fiduciary duty and, as such, would share the liability. On this rationale, liability would exist independent of either a "common enterprise" or a constructive trust theory. Furthermore, the use of this aider and abettor theory would be consistent with recent developments in cases arising under the federal securities laws.⁸²

The *Schein* decision may have a major impact on future inside information cases. The court's novel application of common law fiduciary principles in holding outsiders liable to the corporation for trading profits realized from the use of confidential information extends the boundaries of tippee liability far beyond the limits heretofore known. If only for this reason, the plight of the tippee trader is now more perilous than ever. However, it is not only the *Schein* court's expansion of the scope of tippee liability that is significant. Of equal importance is the vehicle utilized by the court to impose this liability — the shareholders' derivative action.⁸³ Inside information suits under the federal securities laws are normally brought under section 10(b) of the Securities Exchange Act of 1934⁸⁴ and rule 10b-5.⁸⁵ It is well recognized under what is known as the

82. See, e.g., *Brennan v. Midwestern United Life Insurance Co.*, 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970). For an excellent discussion of the various theories of liability available to the courts in this area, see Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597 (1972).

83. Generally, in situations where inside information is used to trade in a company's securities, four different suits may be brought based on the same facts. Actions under the federal securities laws include: 1. an individual or class action by those who traded without the benefit of the confidential information; 2. a suit by the company or one of its stockholders to recover so-called "short-swing" trading profits made by company officials; and 3. an administrative suit brought by the Securities and Exchange Commission for an injunction and the disgorgement of profits. The fourth possible action is the common law derivative suit. See R. FROME & V. ROSENZWEIG, *SALES OF SECURITIES BY CORPORATE INSIDERS* (1972).

As might be expected, the existence of these various remedies causes the possibility of multiple liability for the same acts. This question was raised by the *Schein* defendants in light of the other federal actions then pending against them. See note 67 *supra*. The *Schein* court gave very summary treatment to this issue in a footnote, 478 F.2d 817, 825 n.10, where it was suggested that the defendants could protect themselves from multiple liability by the method employed in *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 93 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005, reh. denied, 404 U.S. 1064 (1971). In *Texas Gulf Sulphur*, the court stated that trading profits realized from the use of confidential information should be paid to the company "subject to the disposition in such manner as the court might direct upon application by the SEC or other interested party or the Court's own motion." 312 F. Supp. at 93. *Texas Gulf Sulphur* was an enforcement proceeding brought for the disgorgement of profits for the eventual benefit of innocent traders. In such a suit the recovering corporation acts as little more than a conduit through which the liabilities of the defendants in other actions can be satisfied. The common law derivative suit, on the other hand, is brought for the benefit of the company. It is submitted that what the *Schein* court seems to suggest is, therefore, a completely unique utilization of the derivative suit.

84. 15 U.S.C. § 78j (1970).

85. 17 C.F.R. § 240.10b-5 (1973).

Birnbaum doctrine⁸⁶ that for a plaintiff to have standing to sue in such an action, he must be either a purchaser or a seller of the securities during the inside trading period.⁸⁷ This requirement precludes actions by non-trading holders of securities, either individually or as a class, to recover profits realized by tippee traders. The *Schein* decision provides a common law cause of action not subject to *Birnbaum*. By utilizing the derivative suit, non-trading shareholders suing on behalf of their corporation may now recover profits gained from a tippee's misuse of inside information.⁸⁸ Thus, *Schein* creates a common law right of recovery where none exists under federal law.

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86. See *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). In *Birnbaum*, shareholders of Newport Steel Corp. brought an action under rule 10b-5 to recover damages from the former president of Newport (Feldmann), the purchaser of Feldmann's charges (Wilport Co.), and others. The plaintiffs alleged that Feldmann had breached his fiduciary duties by refusing a merger which would have been beneficial to the company and, instead, selling his shares in the company to Wilport Co. at a premium. The court held the plaintiff minority shareholders to be unqualified to bring an action under rule 10b-5 since they had neither purchased nor sold the shares. The court interpreted rule 10b-5 as "having no relation to breaches of fiduciary duty by corporate insiders resulting in fraud upon those who were not purchasers or sellers." *Id.* at 463.

87. Recent years have seen significant inroads made on the *Birnbaum* doctrine. It has been criticized both by commentators, *see, e.g.*, Lowenfels, *The Demise of the Birnbaum Doctrine: A New Era for Rule 10b-5*, 54 VA. L. REV. 268 (1968), and by the SEC, *see, e.g.*, Brief for SEC as Amicus Curiae, *Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 383 U.S. 970 (1967). Courts have recognized exceptions to the purchaser-seller requirement where a non-trading plaintiff seeks injunctive relief, *see Mutual Shares Corp. v. Genesco*, 384 F.2d 540 (2d Cir. 1967), and where, because of a merger, a plaintiff becomes a "forced seller" whose only alternative is to exercise his appraisal right, *see Vine v. Beneficial Finance Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967). Nevertheless, despite numerous opportunities, the Second Circuit and most other courts have consistently refused to repudiate *Birnbaum*, (*see, e.g.*, *Drachman v. Harvey*, 453 F.2d 722 (2d Cir. 1971), *rev'd and remanded en banc*, 453 F.2d 736, 738 (2d Cir. 1972); *Iroquois Industries, Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970)), and they have been particularly careful not to extend the scope of rule 10b-5 to give standing to an issuer, *see GAF Corporation v. Milstein*, 453 F.2d 709, 721 (2d Cir. 1971); *General Time Corp. v. Talley Industries, Inc.*, 403 F.2d 159, 164-65 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969). It is clear, therefore, that in the instant case Lum's had no right of action under rule 10b-5. Perhaps the present condition of the *Birnbaum* doctrine is best described by Professor Loss' comment referring to Lowenfels' article *supra*: "[T]he word 'demise' in this context does nevertheless invoke memories of Mark Twain." L. LOSS, SECURITIES REGULATION 3620 (Supp. 2d ed. 1969). *But see Eason v. General Motors Acceptance Corp.*, 490 F.2d 659 (7th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3595 (U.S. Apr. 22, 1974) (No. 1323), wherein the Seventh Circuit abandoned the rule.

88. The use of the common law derivative suit by plaintiffs in inside information cases was recently made even more attractive with the Second Circuit's decision in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir.), *cert. granted*, 414 U.S. 908 (1973). In *Eisen*, an antitrust suit for treble damages, the court established very stringent requirements which must be met in order to bring a class action. The court held that class action plaintiffs must bear the expense of giving notice to the class and rejected the fluid class recovery theory. Unless it is reversed by the Supreme Court, the *Eisen* decision will make many class actions, including those involving inside information, much more difficult to prosecute. *See N.Y.L.J.*, June 6, 1973, at 1, col. 1.